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10 UNITED STATES DISTRICT COURT

11 DISTRICT OF NEVADA

12 MICHAEL J. CONLON,)
13 Plaintiff,) CV-N-01-700-DWH-VPC
14 v.) UNITED STATES'
15) MOTION FOR SUMMARY JUDGMENT
16 UNITED STATES OF AMERICA, et al.)
17 Defendants.)

18 Comes now the United States of America, through its
19 undersigned counsel, and moves this Court for summary judgment,
20 pursuant to Rules 7(b) and 56, Fed.R.Civ.P.

21 This motion is made on the grounds that, based on facts
22 admitted by plaintiff during discovery, plaintiff can not sustain
23 his burden of proof regarding essential elements of his claim.
24 Accordingly, summary judgment must be entered in favor of the
25 United States and against plaintiff.

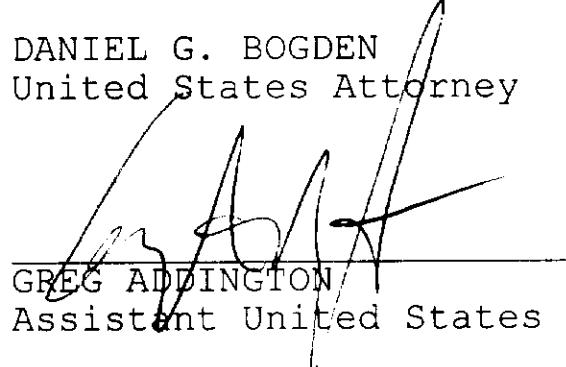
26 This motion is based on the statements and materials
27 described in the declaration of Greg Addington, filed and served

28 84

1 herewith, the accompanying memorandum of law, and the pleadings
2 and papers filed herein.

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4 Respectfully submitted,

5 DANIEL G. BOGDEN
6 United States Attorney

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DANIEL G. BOGDEN
United States Attorney

GREG ADDINGTON
Assistant United States Attorney

MEMORANDUM OF LAW IN SUPPORT OF
UNITED STATES' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Conlon commenced this action pro se against multiple individuals and institutional defendants, seeking damages arising from the "illegal incarceration" of Conlon. In March 2002, Conlon (through counsel) filed an amended complaint. The various defendants (all of whom are federal officials or federal entities) filed a joint motion (#15) to dismiss or for summary judgment. Conlon opposed the motion and also sought leave to file a second amended complaint. Upon leave being so granted, the second amended complaint was filed (#42) although the defendants' dispositive motion was then pending as to the first amended complaint. By Order (#41) entered March 14, 2003, this Court denied the motion to dismiss without prejudice. The Court concluded that the filing of the second amended complaint had left the motion to dismiss the first amended complaint "moot."

18 During the pendency of the motion to dismiss the first
19 amended complaint, this matter was referred to the United States
20 Magistrate Judge for a settlement conference (#38). The parties
21 jointly requested a settlement conference and agreed to a date
22 for the conference (##38&39). Shortly before the settlement
23 conference was to begin, Conlon informed the Court (through
24 counsel) that he would not be appearing at the settlement
25 conference as scheduled. Accordingly, the settlement conference
26 (which Conlon had requested) was vacated (#40).

In response to the second amended complaint, all of the defendants again filed their joint motion to dismiss or for summary judgment (#44), along with a statement of undisputed facts (#45). Following the filing of that motion and prior to any opposition thereto, the parties entered into a stipulation which provided (1) for the dismissal of all defendants except the United States, (2) for a dismissal of all actions against the United States except claims arising under the Federal Tort Claims Act (FTCA), and (3) for a stay of the action against the United States for 60 days so that the parties could (again) seek the services of the Court for a settlement conference. The stipulation was approved by the Court on May 6, 2003 (#53).

A settlement conference was again scheduled before the United States Magistrate Judge for July 16, 2003 (#55). Again, Conlon failed to appear for the scheduled conference (#56). Conlon's counsel then sought leave to withdraw as counsel of record, which motion was granted on September 15, 2003 (#60).

Following the second aborted settlement conference, the United States renewed (#62) its motion to dismiss the FTCA claims (which, by stipulation of the parties, were the only claims which remained pending). Plaintiff obtained new counsel and opposed the motion. By Order (#77) entered June 9, 2004, the United States' motion to dismiss was granted in part and denied in part. Based on the June 9, 2004, Order, the only jurisdictionally viable claim which remains is "...plaintiff's first negligence claim arising out of the events surrounding his February 19, 1998

1 arrest and subsequent imprisonment." See Order (#77), p. 18,
 2 lines 1-3.

3 Following the June 9, 2004, Order, this Court directed the
 4 parties to a status conference before U.S. Magistrate Judge Cooke
 5 for entry of an appropriate scheduling order regarding discovery
 6 and other pretrial proceedings. See Minutes of the Court (#78).
 7 At the August 17, 2004 status conference, the parties agreed to
 8 and the Court approved of a scheduling order (#79) which
 9 established deadlines for completion of discovery (October 15,
 10 2004), the filing of dispositive motions (November 15, 2004), and
 11 the submission of a joint pretrial order (December 15, 2004).
 12 The Minutes of the Court from the status conference (#79) also
 13 reflect the parties' agreement that a settlement conference be
 14 scheduled (again).¹

15 Mindful of the abbreviated discovery period, the United
 16 States immediately propounded requests for admission and
 17 interrogatories to plaintiff. Responses to the discovery were
 18 due September 21, 2004. Plaintiff failed to respond by the due
 19 date. Again mindful of the abbreviated discovery period, United
 20 States' counsel spoke to plaintiffs' counsel and then wrote a
 21 letter to plaintiffs' counsel regarding the delinquent responses.
 22 The September 28, 2004 letter specifically informed plaintiff
 23 that the matters set forth in the requests for admissions were

24 : A settlement conference is now scheduled before U.S.
 25 Magistrate Judge Cooke for November 19, 2004. See Order (#80).
 26 It remains to be seen whether plaintiff will bother to appear at
 27 the (third) scheduled settlement conference. See Plaintiff's
 Request to Waive Settlement Conference (#81).

1 deemed admitted by operation of Rule 36, Fed.R.Civ.P. See Letter
2 dated 9-28-04 (attached as exhibit B to declaration of Greg
3 Addington).

4 The October 15, 2004, discovery deadline passed with no
5 responses by plaintiff to the discovery propounded by the United
6 States. On November 5, 2004, proposed responses to the request
7 for admissions and interrogatories were delivered by plaintiff to
8 United States' counsel. By letter of the same date, plaintiff's
9 counsel was informed that the admissions were deemed admitted in
10 accordance with Rule 36 and that relief under Rule 36 would need
11 to be obtained if those deemed admissions were to be withdrawn.
12 The same letter also noted the significant deficiencies in the
13 responses to interrogatories. See Letter dated 11-5-04 (attached
14 as exhibit C to declaration of Greg Addington).²

15 Mindful of the deadline for filing of dispositive motions,
16 the United States now brings its motion for summary judgment
17 based on the "deemed admissions" set forth in the request for
18 admission. As of the date of this motion, plaintiff has not
19 sought relief from the deemed admissions as provided in Rule
20 36(b), Fed.R.Civ.P.

21
22 II. STATEMENT OF FACTS

23 The following facts have been deemed admitted by operation
24 of Rule 36, Fed.R.Civ.P. See United States' Requests for

25 _____
26 ² As required, United States' counsel is attempting to
27 resolve the deficiencies in the interrogatory responses prior to
filing a motion to compel. As of the date of this motion, those
efforts have not been successful.

1 Admission (attached as exhibit A to declaration of Greg
2 Addington). The language below is a verbatim re-creation of the
3 requests for admission, except as indicated.

4 1. On August 8, 1986, [Conlon was] sentenced to a 12-year
5 term of imprisonment and an 8-year special parole term by the
6 U.S. District Court for the Western District of Texas for
7 distribution of cocaine.

8 2. Prior to being mandatorily released on November 7, 1997
9 from [Conlon's] 12-year term of imprisonment, [he was] paroled
10 four times.

11 3. Prior to being mandatorily released on November 7, 1997
12 from [his] 12-year term of imprisonment, [Conlon's] parole was
13 revoked four times.

14 4. Following [his] release from imprisonment on November 7,
15 1997, [Conlon was] subject to supervision on mandatory release by
16 a U.S. Parole Officer until January 28, 1998.

17 5. The 8-year special parole term imposed by the U.S.
18 District Court for the Western District of Texas commenced on
19 January 28, 1998.

20 6. On February 12, 1998, the U.S. Parole Commission issued
21 a violator warrant regarding an alleged violation of the
22 conditions of [Conlon's] special parole.

23 7. The U.S. Parole Commission's issuance of the February
24 12, 1998 violator warrant was not caused by any negligent or
25 wrongful act or omission of any employee of the United States.

26 8. The stated factual basis for the Parole Commission's
27 issuance of the February 12, 1998 violator warrant was [Conlon's]

1 alleged failure to inform a U.S. Parole Officer of a change in
2 [his] residence address.

3 9. Prior to the Parole Commission's issuance of the
4 February 12, 1998 violator warrant, [Conlon] had failed to inform
5 a U.S. Parole Officer of a change in [his] residence address.

6 10. Prior to the Parole Commission's issuance of the
7 February 12, 1998 violator warrant and after the commencement of
8 [his] 8-year special parole term, [Conlon] had changed [his]
9 residence address.

10 11. One of the conditions of [Conlon's] 8-year term of
11 special parole was an obligation to inform a U.S. Parole Officer
12 of a change in [his] residence address.

13 12. [Conlon was] arrested on the U.S. Parole Commission's
14 February 12, 1998 violator warrant on February 20, 1998.

15 13. [Conlon's] February 20, 1998 arrest was not caused by
16 any negligent or wrongful act or omission of any employee of the
17 United States.

18 14. On February 25, 1998, [Conlon] admitted to the
19 violation described in the U.S. Parole Commission's February 12,
20 1998 violator warrant during a preliminary interview with a U.S.
21 Parole Officer.

22 15. The U.S. Parole Commission had jurisdiction to issue a
23 warrant on February 12, 1998, for [Conlon's] arrest on account of
24 [his] failure to inform a U.S. Parole Officer of a change in
25 [his] residence address.

16. [Conlon] filed a petition for writ of habeas corpus in the U.S. District Court for the District of Arizona on July 27, 1998.

17. On August 27, 1998, [Conlon] (through counsel) requested leave to amend [the] petition for writ of habeas corpus in the U.S. District Court for the District of Arizona.

18. On November 4, 1998, [Conlon] (through counsel) requested an extension of time in which to amend [the] petition for writ of habeas corpus in the U.S. District Court for the District of Arizona.

19. On January 29, 1999, [Conlon] (through counsel) requested an extension of time in which to amend [the] petition for writ of habeas corpus in the U.S. District Court for the District of Arizona.

20. On February 19, 1999, [Conlon] (through counsel) filed an amended petition for writ of habeas corpus in the U.S. District Court for the District of Arizona.

21. On March 8, 1999, [Conlon] (through counsel) filed a motion for release on bond pending resolution of [his] petition for writ of habeas corpus in the U.S. District Court for the District of Arizona.

22. On April 2, 1999, the U.S. District Court for the District of Arizona ordered that service of the amended petition for writ of habeas corpus and the motion for release on bond be made upon the United States.

23. The United States responded to the motion for release on bond on April 2, 1999.

1 24. The United States responded to the amended petition for
2 writ of habeas corpus on May 20, 1999.

3 25. Pursuant to the order of the U.S. District of Arizona,
4 [Conlon was] released from custody on December 15, 1999.

5 26. No portion of [Conlon's] incarceration from February
6 20, 1998 to December 15, 1999 was caused by any negligent or
7 wrongful act or omission of any employee of the United States.

8 27. In April 2000, [Conlon was] arrested in Minnesota for
9 criminal conduct including fraud and making a false statement to
10 a police officer.

11

12 III. ARGUMENT

13 The Ninth Circuit has long recognized that "unanswered
14 requests for admissions" provide a sufficient basis for granting
15 summary judgment. O'Campo v. Hardisty, 262 F.2d 621, 624 (9th
16 Cir. 1958); see also Cereghino v. Boeing Co., 873 F.Supp. 398,
17 403 (D.Ore. 1994) (granting summary judgment on the basis of Rule
18 36 admission "accruing upon [the plaintiff's] default in
19 responding" to the defendant's request for admissions).

20 Rule 36, Fed.R.Civ.P., provides the unambiguous description
21 of the effect of such admissions on the litigation.

22 Rule 36. Requests for Admission

23 (a) Request for Admission

24 ... The matter is admitted unless, within 30
25 days after service of the request, or within
26 such shorter or longer time as the court may
allow...., the party to whom the request is
directed serves upon the party requesting the
admission a written answer or objection
addressed to the matter...

(b) Effect of Admission

(b) Effect of Admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission.

Rule 36, Fed.R.Civ.P.

By the plain language of the rule, a party's failure to respond to a request for admission within the designated period results in automatic admission of the requests and conclusively establishes the admitted facts as the law of the case. An-Port, Inc. v. MBR Ind., 772 F.Supp. 1301 (D.Puerto Rico 1991); see also Milene Music, Inc. v. Gutauco, 551 F.Supp. 1288 (D.C.R.I. 1982); Upshaw v. Equitable Life Assur. Soc of U.S., 85 F.R.D. 674 (D.C. Ark. 1980); Weaver Oil Cor. v. Belco petroleum Corp., 68 F.R.D. 663 (D.C.W.Va. 1975).

Prior rulings of this Court in this case have narrowed the jurisdictionally viable claims to a single claim under the Federal Tort Claims Act (FTCA). That claim is based on the allegations of negligence "arising out of the events surrounding [Conlon's] February 19, 1998 arrest and subsequent imprisonment." See Order (#77), p. 18, lines 1-3. All other claims have been dismissed. Id. at p. 20, lines 16-23.

The FTCA provides a waiver of sovereign immunity for recovery of damages against the United States for "personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment..." See 28 U.S.C., section 2679(a); see also 28 U.S.C., sections 1346(b)(1) and 2672. By operation of Rule 36(b), Fed.R.Civ.P., plaintiff

1 has admitted the following facts (among others) and they are
2 "conclusively established" for the purpose of this pending
3 action:

4 - On February 12, 1998, the U.S. Parole Commission issued a
5 violator warrant regarding an alleged violation of the conditions
6 of Conlon's special parole;

7 - The U.S. Parole Commission's issuance of the February 12,
8 1998 violator warrant was not caused by any negligent or wrongful
9 act or omission of any employee of the United States;

10 - Conlon was arrested on the U.S. Parole Commission's
11 February 12, 1998 violator warrant on February 20, 1998.

12 - Conlon's February 20, 1998 arrest was not caused by any
13 negligent or wrongful act or omission of any employee of the
14 United States;

15 - Pursuant to the order of the U.S. District of Arizona,
16 Conlon was released from custody on December 15, 1999;

17 - No portion of Conlon's incarceration from February 20,
18 1998 to December 15, 1999 was caused by any negligent or wrongful
19 act or omission of any employee of the United States.

20 Based on the conclusive establishment of such facts,
21 plaintiff can not prevail on his FTCA claim against the United
22 States. The only basis for imposition of FTCA liability is a
23 causal link between the claimed damages and some "negligent or
24 wrongful act or omission" of a United States employee. The Rule
25 36 admissions have "conclusively established" that no such causal
26 link exists. Plaintiff can not sustain his burden of proof on
27 the essential elements of his FTCA claim and, accordingly,

1 summary judgment should be entered against plaintiff on that
2 claim, which is the only claim before the Court.
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IV. CONCLUSION

5 Based on the foregoing, summary judgment should be entered
6 against plaintiff and in favor of the United States.
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Respectfully submitted,

9 DANIEL G. BOGDEN
United States Attorney
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12 GREG ADDINGTON
Assistant United States Attorney
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2 CERTIFICATE OF SERVICE
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4 I certify that a copy of the foregoing UNITED STATES' MOTION
5 FOR SUMMARY JUDGMENT and DECLARATION OF GREG ADDINGTON was mailed
6 by first-class mail, postage pre-paid, on November 12, 2004,
7 to:
8
9 James Andre Boles
10 18 Stewart Street
11 Reno, NV 89501
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Judy R Farmer